Supreme Court, U.S.
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No. 91-1990

In the Supreme Court of the United States

OCTOBER TERM, 1992

TIPCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's finding that petitioner violated the Perishable Agricultural Commodities Act of 1930, (PACA), 7 U.S.C. 499a *et seq.*, was supported by substantial evidence.

2. Whether the Secretary acted properly by interpreting Section 2(4) of the PACA, 7 U.S.C. 499b(4), which prohibits PACA licensees such as petitioner from "fail[ing], without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any" transaction involving perishable agricultural commodities, to prohibit commercial bribery in the produce market.

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OPINIONS BELOW

The per curiam opinion of the court of appeals, Pet. App. 1a-6a, is unpublished, but the decision is noted at 953 F.2d 639 (Table). The decision and order of the Judicial Officer of the Department of Agriculture (JO), Pet. App. 7a-54a, is reported at 50 Agric. Dec. 871. The initial decision and order of the Administrative Law Judge (ALJ), Pet. App. 55a-85a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing en banc was denied on March 13, 1992. Pet. App. 87a-88a. The petition for a writ of certiorari was filed

on June 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a wholesale distributor of agricultural produce and is licensed under the Perishable Agricultural Commodities Act of 1930 (PACA), 7 U.S.C. 499a *et seq.* In 1988, an investigation by the United States Department of Agriculture (USDA) of petitioner's competitor, Sid Goodman & Co. (Goodman), revealed that Goodman was bribing the purchasing agents of Magruder's, Inc. (Magruder's) and Fresh Value, Inc. (Fresh Value) to induce the agents to buy produce from Goodman rather than from competitors. This investigation also uncovered information indicating that petitioner had made a similar payment to William Crandall, a Magruder's employee, to induce produce purchases from petitioner.

The evidence indicated that Crandall had approached Tipco's Manager, Frank Spinale, at a time when Magruder's was behind in payments to Tipco in the approximate amount of $276,000. Crandall demanded that Tipco pay him a "brokerage fee" of 25 cents per container purchased by Magruder's. Spinale interpreted Crandall's demand to mean that Magruder's would not continue to purchase produce from Tipco unless these fees were paid to Crandall. Pet. App. 58a. Between June and November, 1988, Tipco paid Crandall $38,000 in such "brokerage fees." *Id.* at 3a.

2. The USDA filed a formal administrative complaint against petitioner seeking revocation of petitioner's PACA license. The USDA complaint charged in relevant part that petitioner flagrantly and repeatedly violated the first and third unnumbered

clauses of Section 2(4) of PACA, 7 U.S.C. 499b(4).[1] First, the USDA alleged that petitioner made false statements on invoices submitted to Magruder's in violation of Section 2(4) because the invoices did not accurately disclose the price paid to petitioner. The invoices failed to disclose the "brokerage fee" and failed to disclose that petitioner increased the price it charged Magruder's for its produce by 25 cents per package, in violation of the agreement between Magruder's and petitioner that Magruder's would pay petitioner a gross profit of only $1.50 per package above petitioner's costs. Second, the USDA further alleged that petitioner breached an implied duty owed to its customer, Magruder's, to refrain from bribing one of its employees.

The ALJ conducted a hearing and dismissed the complaint. The ALJ determined that PACA does prohibit commercial bribery in transactions between li-

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[1] The Secretary is authorized to revoke a PACA license when the licensee's violations of the statute are "flagrant or repeated." 7 U.S.C. 499h(a). Section 2(4) of PACA, 7 U.S.C. 499b(4), provides in relevant part as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker [1] to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; * * * or [3] to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction * * *.

censed produce dealers and their customers. He nevertheless concluded that the evidence was insufficient to establish a violation of PACA in this case. Pet. App. 74a, 82a. The ALJ observed that Tipco's invoices to Magruder's did not reveal the payments to Crandall; Magruder's had a written policy prohibiting acceptance of such payments; Crandall's supervisor at Magruder's, Stanford Steppa, testified that he did not have knowledge of the payments; Spinale testified that he never told Steppa about the payments; and no other witness testified that Steppa in fact had knowledge of the payments. Nevertheless, the ALJ concluded that Steppa's denial of knowledge was "not convincing." *Id.* at 76a. The ALJ according concluded that Magruder's had knowledge that petitioner was paying kickbacks to Crandall as early as August or September 1988, but nevertheless allowed the payments to continue. *Id.* at 82a.

3. On appeal, the Judicial Officer reversed the ALJ. After thoroughly reviewing the evidence and the law in an exhaustive opinion, the JO found willful, flagrant and repeated violations of the first and third unnumbered clauses of Section 2(4) of PACA, 7 U.S.C. 499b(4), and ordered revocation of petitioner's license, relying on the Secretary's earlier decision, *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (Sept. 26, 1990), aff'd, 945 F.2d 398 (4th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1585 (1992) (*Goodman*). Pet. App. 4a, 20a, 27a.

The JO concluded that the inference that Magruder's was aware of the payments to Crandall was "not * * * supported by the record." Pet. App. 40a. The JO emphasized that Magruder's had a written policy prohibiting acceptance of such payments, and that he could not "glean from the record any apparent reason

why Steppa should want his employees to receive payments from suppliers." *Id.* at 41a. Steppa had testified that he was not aware of the payments, and the JO found that there was simply no credible evidence to contradict this testimony. He also observed that the ALJ in *Goodman* decided "this same issue in favor of Steppa's credibility." *Ibid.* The Secretary accordingly concluded that petitioner made payments to Crandall to induce him to buy more produce; that Magruder's was not aware of and had not authorized Crandall to receive such payments; and that the payments constituted willful, flagrant and repeated conduct warranting the revocation of petitioner's license. *Id.* at 4a.

4. In an unpublished per curiam decision, the court of appeals affirmed the Secretary's license revocation as a penalty for conduct in violation of PACA. Pet. App. 1a-6a. The court of appeals acknowledged that the JO's decision "directly contradicted the findings of the ALJ," *id.* at 5a, but stated that "the possibility of reaching two different conclusions does not prevent the agency's findings from meeting the substantial evidence test." *Ibid.* The court found that the JO's reasons for departing from the ALJ's findings were "apparent on the face of the JO's opinion and turn[ed] on the JO's differing interpretation of the evidence regarding Magruder's knowledge, or lack thereof, of the payments to Crandall." *Ibid.* The court concluded that "[o]n this record, there is substantial evidence, including Steppa's own testimony, to support the JO's conclusion that Magruder's was unaware of the payments." *Ibid.*

The court also held that the Secretary's decision was consistent with the court's earlier decision ~~in~~ AFFIRMING *Goodman*. Pet. App. 5a-6a. It found no reason to de-

part from *Goodman* on the facts of this case, noting that "[m]any of the same actors are involved and the conduct in question occurred in the same produce market." *Id.* at 6a.

ARGUMENT

The petition presents two questions. The first is whether the Secretary of Agriculture's decision, which reversed a factual determination of the ALJ, was nevertheless supported by substantial evidence. The second is whether the Secretary properly interpreted the "implied duty" clause of PACA to prohibit commercial bribery by produce sellers licensed under the statute. The court of appeals reviewed the record and held that the JO's decision was supported by "substantial evidence" even though it contradicted the findings of the ALJ, Pet. App. 5a, and affirmed the agency's adjudicatory determination that petitioner's actions violated PACA. *Id.* at 5a-6a.

The Fourth Circuit's decision to affirm the agency's holding in this case is consistent with *Sid Goodman & Co.* v. *United States*, 945 F.2d 398 (1991) (Table), cert. denied, 112 S. Ct. 1585 (1992), in which the Fourth Circuit affirmed the agency's finding of a PACA violation on very similar facts involving a different petitioner.[2] Neither of the questions presented by petitioner here is of any more significance than the questions this Court declined to entertain when it denied certiorari in that almost identical case. Neither question involves a split in circuit authority or a conflict with any decision of this Court. Further review is therefore unwarranted.

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[2] A copy of the government's brief in opposition in that case has been provided to counsel for petitioner.

1. Petitioner contends that the court of appeals erred by affirming a decision of a JO that overturned a factual finding made by an ALJ.[3] Petitioner claims that the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," that certiorari is warranted under this Court's rules. Pet. 11. In fact, the court of appeals' decision was entirely within the "accepted and usual course" of review of agency decisions, which for more than 40 years has been that such decisions remain undisturbed on appeal if supported by substantial evidence. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

a. Under the "substantial evidence" review, the reviewing court is required to give deference to the findings of the *agency*, not the findings of an ALJ or trial examiner. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951); *Local Union No. 948* v. *NLRB*, 697 F.2d 113, 118 (6th Cir. 1982) ("Our review for substantial evidence requires this court to accept the *Board's* credibility determinations unless they are unreasonable.") (emphasis added); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("credibility findings made by the ALJ *and accepted by the Board* will not be overturned unless they are 'hopelessly incredible' ") (emphasis added), cert. denied, 461 U.S. 906 (1983); *Kopack* v. *NLRB*, 668 F.2d 946, 952 (7th Cir.) ("*Universal Camera* makes clear that it is the Board's decision, rather than that of the ALJ, which is subject to scrutiny by a reviewing court under the sub-

[3] This issue was not presented by *Goodman* because in that case the ALJ determined that PACA had been violated.

stantial evidence test"), cert. denied, 456 U.S. 994 (1982). The fact that the agency and the ALJ disagree does not modify in any way the requirement that the *agency's* determination be supported by substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 496; *Mattes* v. *United States*, 721 F.2d 1125, 1129 (7th Cir. 1983).

Thus, the sole issue properly before the court of appeals was whether substantial evidence supported the Secretary's determination. *Kopack* v. *NLRB*, 668 F.2d at 952. In deciding this issue, the court of appeals was required to consider the record as a whole, including the fact that the agency reversed the decision of the ALJ. But the ALJ's findings are not "sacrosanct" or "binding on the [agency] or the court," *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975). The agency must be permitted to "substitute its judgment for that of the ALJ" even when the ALJ's findings are based on credibility determinations. *Mattes* v. *United States*, 721 F.2d at 1129; see *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977). Otherwise, there could be *no* appellate review of factual determinations. The ALJ's findings are accordingly just one "part of the record to be considered on appeal" by a reviewing court that is applying the "substantial evidence" standard.[4]

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[4] The fact that the ALJ and the agency have reached opposite results, especially when the ALJ's decision was based upon observation of a witness's demeanor, may affect the appellate court's determination as to whether the agency's decision was actually supported by substantial evidence. See *Universal Camera*, 340 U.S. at 496 ("evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's

b. In this case the Fourth Circuit correctly and adequately applied the substantial evidence standard. The JO set forth reasonable and substantial grounds for his decision to reverse the ALJ, including the fact that Magruder's policy prohibited such payments, and there was "no apparent reason why Steppa should want his employees to receive payments from suppliers." Pet. App. 41a. Further, no witness testified that Steppa had knowledge, and the ALJ in *Goodman* had in fact determined that Steppa's testimony was credible. The court of appeals accordingly found that "the JO's differing interpretation of the evidence regarding Magruder's knowledge * * * of the payments to Crandall" was supported by "substantial evidence." Pet. App. 5a.[5]

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than when he has reached the same conclusion"); *Adolph Coors*, 497 F.2d at 1184 ("the [ALJ's] findings should be considered on review and given such weight as they merit within reason and the light of judicial experience") (citing *OKC Corp.* v. *FTC*, 455 F.2d 1159, 1162 (10th Cir. 1972), and *Universal Camera*, 340 U.S. at 496). But the mere fact that the agency has reversed the factual findings or credibility determinations of the ALJ certainly does not mandate a reversal of the agency's decision.

[5] The focus of petitioner's complaint seems to be that the JO ignored the ALJ's determinations as to the credibility of a particular witness. It is true that credibility determinations based upon the *demeanor* of a witness may have weight in an appellate court's substantial evidence review of a contrary finding by an agency. *Penasquitos Village*, 565 F.2d at 1079. But an agency is free to substitute its judgment for that of the ALJ even when the ALJ's findings are based on credibility determinations. *Mattes*, 721 F.2d at 1129; *Penasquitos Village*, 565 F.2d at 1079. Furthermore, as the Fourth Circuit noted, the ALJ's conclusion that Steppa was lying when he claimed not to know of Tipco's payments to Crandall seems to have been based more upon inferences from record evidence

There is no basis for further review of that determination in this Court. See *Universal Camera*, 340 U.S. at 490-491 ("[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.").

2. The second question presented by petitioner is an attempt to revisit the argument made unsuccessfully in *Goodman* that the Secretary erred by interpreting PACA in the course of this administrative adjudication. These arguments are almost identical to those made in the petition for certiorari

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than upon the ALJ's unique opportunity to observe witness demeanor. Pet. App. 5a. Rather than pointing to demeanor evidence such as the "expression of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, [or] his coloration during critical examination," *Penasquitos Village*, 565 F.2d at 1078-1079, the ALJ described such factors as the unlikelihood that Steppa would do nothing if Crandall was paying too much for inferior produce, Pet. App. 78a, and the fact that Steppa had "reasons to suspect that Crandall was up to something," such as the fact that Crandall had tried to have delivered to his home a television set meant for the company. *Id.* at 80a. Similarly, the ALJ noted that it was "a common joke" with other stores' produce managers that Crandall was on the take and inferred from an unfinished statement made by Steppa that Steppa was aware of these jokes, *ibid.* (even though, as the JO pointed out, these jokes preceded by several years the actual June 1988 beginning of the Tipco payments, *id.* at 41a). These are inferences drawn from the record itself and not from Steppa's demeanor; thus, even if the ALJ's demeanor determinations were entitled to special deference, these findings would not be.

in *Goodman*,[6] and they were fully addressed in our brief in opposition in that case (at 4-11). We have served a copy of our brief in opposition in that case on petitioner's counsel. As in *Goodman*, there is no reason for further review of these issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner contends that this case is different from *Goodman* because the ALJ here indicated that a strong case of extortion could be made out under the facts of this case. Pet. 17 n.15; Pet. App. 76a. The JO, however, rejected petitioner's contention that it had been subjected to extortion, in part because petitioner had available to it many "reasonable, legal alternatives to violating the law" and in part because even if the payments had been "extorted" from petitioner, a prosecution for bribery would not be precluded. *Id.* at 45a-50a. The fact that the unlawful initiative came from the recipient of the bribe rather than from petitioner does not make this case any more appropriate for further review.

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